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No. 89-1283

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ARCADIA, OHIO, *et al.*,
Petitioners,

v.

OHIO POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

There are at least three fundamental errors in respondent's submission to this Court: 1) The court of appeals did not apply a conflict preemption analysis, but instead applied a field preemption analysis. 2) Congress did not create a regulatory scheme of limited SEC and FERC scrutiny of public utility holding companies in which imagined conflicts, based upon vague notions of "frustration of purpose," would be sufficient to undermine the FERC's ratemaking authority. 3) Nothing in Section 13(b) of PUHCA or the SEC's rules or orders imposes *any* requirement upon Ohio Power that is inconsistent with the FERC's rate order. Each of these errors warrants a brief discussion in reply.

I.

Respondent, which is interested primarily in winning this case, makes a concerted effort to have the case decided without regard to the clear holding of the court of appeals and the significant consequences to FERC ratemaking that flow from that holding. Thus, respondent denies that the court of appeals applied a "field preemption" analysis to interpret Section 318 as ousting FERC from any field in which the SEC may tread. Resp. Br. 16-17, 39. Respondent therefore does not dispute petitioners' argument that the panel's interpretation of the statute is contrary to the language, structure and legislative history of the entire Public Utility Act of 1935 (of which PUHCA and the FPA were the two principal components). Pet. Br. 17-35. Instead, respondent argues that the court of appeals's ruling was narrow and "carefully channeled" (Resp. Br. 17), and that it held only that Section 318 ousts FERC in this case because "the FERC's market-price test . . . is fundamentally incompatible with cost-based regulation of the Ohio Power-Southern Ohio transactions by the SEC." Resp. Br. 17.

By contrast, respondent's *amicus*, keenly interested in an unlimited opportunity for passing on inflated costs to electric customers, "unqualifiedly supports" the actual holding below, which deprives FERC of ratemaking authority whenever the SEC "has any jurisdiction" under a provision of PUHCA, such as Section 13(b). Brief of *Amicus Curiae* Registered Holding Company Group ("*Amicus* Brief") at 2-3.[1] *Amicus's* candor is as re-

[1] *Amicus* reads the term "requirement" out of Section 318. See Pet. Br. 18-20. By arguing that FERC loses its ratemaking authority whenever the SEC's latent jurisdiction can be invoked, *amicus* simply ignores the crucial restriction in the statute that there must be a requirement imposed by the SEC. It also fails to explain how its interpretation of Section 318 can be squared with the language in Section 204(f) of the FPA, which broadly restricts FERC's jurisdiction over any "security issues . . . regulated by a State Commission," 16 U.S.C. § 824c(f). Obviously, when Congress intended to implement a sweeping restriction upon the FERC's regulatory authority, it did so clearly and not with the type of limiting language used in Section 318.

freshing as its motives are suspicious. Its perception that the "field preemption" theory will free its members of a great deal of regulation by the FERC is unquestionably correct, and underscores the danger of the court of appeals's holding.

That court flatly rejected the argument that "the bar of section 318 applies only when there is a present conflict between SEC and FERC prescriptions." Pet. App. 14a. Instead, the court held that its decision rested "on the threshold matter of the language of [Section 318] which commits the determination of the inter-associate price to the SEC." *Id.* at 15a.[2] It is thus respondent, and not petitioners (see Resp. Br. 15), that has failed to defend the basis for the decision in its favor.[3] For the reasons explained in petitioners' opening brief

[2] As explained in petitioners' opening brief (at 18-19), the court of appeals's decision is ambiguous and can be read as relying upon either of two theories: (1) that Section 318 gives the SEC exclusive jurisdiction over all matters within its authority regardless of whether the SEC has exercised that authority; and (2) that Section 318 grants the SEC exclusive jurisdiction whenever the SEC has actually exercised some authority, however limited, over the "subject matter" at issue. Both approaches can properly be characterized as "field preemption," the only difference being how the "field" is defined.

[3] Petitioners have consistently defended the first-stated basis for the FERC's decision, *i.e.*, that the FERC was imposing no requirement upon respondent that was inconsistent with any requirement imposed by the SEC. See Pet. App. 37a-38a. Respondent simply ignores this alternative holding when it claims (Resp. Br. 13) that the FERC's decision did not rely upon the absence of an actual conflict, and when it therefore accuses petitioners and the Government of engaging in post hoc rationalization (Resp. Br. 14-15). Thus, for the reasons stated by the FERC in its reply brief (Br. 2-4), the suggestion of respondent (Resp. Br. 15-16 & n.10) that the petition should be dismissed as improvidently granted is without merit.

and in the briefs of the Solicitor General, the court of appeals's field preemption holding must be reversed.

II.

Respondent attempts to defend the holding of the court of appeals on the alternative ground that there is, in fact, a "conflict" between the SEC's and the FERC's regulatory requirements in this case. Respondent does not seriously dispute that there is no "actual conflict" here in the sense of inconsistent obligations.[4] Rather, it asserts that, directly or indirectly, "the SEC and the FERC were each seeking to regulate . . . the price to be paid to Ohio Power for coal." Resp. Br. 18.[5] According to respondent, this is sufficient to invoke Section 318 because that provision ousts FERC of its regulatory jurisdiction whenever a particular FERC order might "frustrate the purposes" of PUHCA or of an SEC regulation or order. Resp. Br. 28, 30. But this argument is misguided for exactly the same reasons that the court of appeals's "field preemption" theory was misguided: It distorts significantly the complementary, concurrent regulatory schemes established by Congress, as reflected in the language, structure and legislative history of the FPA and PUHCA. See Pet. Br. 17-35.

In interpreting Section 318, it is important to remember that one of the principal purposes of the entire Pub-

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[4] Respondent does suggest that Section 13(b) of PUHCA prevents it from collecting from its ratepayers anything more or less than SOCCO's "cost." See Resp. Br. 21, 27 n.21. But that argument is without substance. See *infra* 9-13.

[5] Respondent falsely asserts that "no one disputes" this characterization of the FERC's action. Resp. Br. 18. Both petitioners (at 28) and the Government (at 35) strongly dispute that characterization: FERC's order sought to regulate the fuel charges respondent imposes on its ratepayers, not the price respondent actually pays for its coal. Moreover, FERC's regulation of rates need not affect the inter-affiliate price; hence there is no conflict between the two regulatory regimes. See *infra* 16-18; Pet. Br. 43-44.

lic Utility Act was to curb abuses of public utility holding companies and their affiliates. See Pet. Br. 25-32. In Section 1(b)(2) of PUHCA, for example, Congress specifically condemned the "evils" that "result from an absence of arm's-length bargaining" in transactions involving subsidiary companies for "equipment, and materials." Congress then announced that because of such "abuses" a holding company could become "an agency, which, unless regulated, is injurious to investors, consumers, and the general public," and for that reason should be "eliminat[ed] except as otherwise expressly provided in this title." PUHCA § 1(c), 15 U.S.C. § 79a(c). Accordingly, Congress declared that "all the provisions of this title shall be interpreted to meet the problems and eliminate the evils as enumerated in this section." *Id.* Against this congressionally declared rule of construction, it would be wholly inappropriate to interpret Section 318 in a manner that permits public utility holding companies to use Section 13(b) of PUHCA as a device to avoid FERC regulation of their electric rates, and thereby to charge extravagantly higher rates than such regulation would allow.

The most effective means of achieving Congress's purpose is to interpret Section 318 as overriding regulation under the Federal Power Act *only* when mutually inconsistent obligations are imposed by or under that Act and by or under PUHCA. Interpreted that way, Section 318 serves its intended function by supplying a tie-breaker with respect to these two acts, but otherwise leaving the FERC and the SEC free to exercise plenary authority within their respective spheres. See Pet. Br. 25-32. It thereby ensures that both regulatory regimes will operate to the fullest possible extent, consistent with this Court's teaching that where two statutory schemes "are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus* v.

Monsanto Co., 467 U.S. 986, 1018 (1984); see also *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 370 (1986) ("where possible, provisions of a statute should be read not to create a conflict").

Moreover, only this interpretation of Section 318 eliminates regulatory gaps. Requiring inconsistent obligations as the trigger for Section 318 ensures that when the FERC is deprived of its jurisdiction, the FERC action is squarely in conflict with a self-operative provision of PUHCA or some actual exercise of regulatory authority by the SEC. A court order compelling the FERC to withdraw under such circumstances will not create a regulatory gap because either PUHCA or the SEC, by definition, has in place a specific regulatory obligation.[6]

By contrast, respondent's argument that the FERC should be deprived of its authority to regulate interstate rates whenever a court determines that a FERC order will "frustrate the purpose" of the SEC is wholly at odds with the purpose and structure of the Public Utility Act. It also finds no basis in the language of Section 318. Respondent borrows its "frustration of purpose" standard from preemption cases, but makes no effort to explain why Congress would have incorporated that standard into a statute that only resolves conflicts in "requirements" imposed by two federal agencies or their organic statutes. See Pet. Br. 18-20. The natural reading of that language is quite the opposite: It may make sense to describe "regulations" or "orders" as conflicting in the sense of frustrating each others' purposes, but it makes no sense to speak of conflicting "requirements" imposed by those regulations or orders *except* in the

[6] Respondent asserts that its interpretation creates no gap because one agency or the other still would presumably have *jurisdiction* to regulate the transaction. See Resp. Br. 11, 42. But that is beside the point. Section 1 of PUHCA could not more plainly evince Congress's intent to ensure actual regulatory *control* to prevent abuse. See Pet. Br. 26.

sense of inconsistent obligations.[7] Respondent's "frustration of purpose" argument is therefore contrary to the plain statutory language for much the same reasons that the court of appeals's "field preemption" argument runs afoul of that language. See Pet. Br. 18-20, 23-25.

But even more dubious is the assumption that underlies respondent's argument—*i.e.*, that Congress intended to allow courts to guess as to when a FERC requirement "frustrates" an SEC purpose or "stands as an obstacle to the full achievement" of the SEC's objectives. These terms simply were not considered in any way synonymous with "conflict" in 1935 and therefore cannot properly be incorporated into the word "conflict" in Section 318's title.[8] Moreover, the interpretation proposed by

[7] There is no merit to respondent's argument that, in light of Section 21 of PUHCA (15 U.S.C. § 79u), Section 318 would be "unnecessary" if read as applying solely to conflicts based upon inconsistent obligations. Resp. Br. 30. As respondent itself recognizes, the language of Section 21 is *broader* than that of Section 318, because it does not require conflicting "requirements." Absent Section 318, therefore, SEC orders and regulations might have a broader preemptive effect on FERC regulation than Section 318 permits. Section 318 was thus necessary to effectuate Congress's purpose of comprehensively regulating both the inter-affiliate transaction aspects (through SEC regulation) *and* the rate consequences (through FERC regulation) of the activities of PUHCA-regulated utilities.

[8] To petitioners' knowledge, the first decision to suggest any equivalency between "conflict" and "frustration of purpose" was *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), which was decided six years *after* Congress enacted the statute at issue. Thus, statements in the legislative history to the effect that Section 318 reaches "any conflict" between the SEC and the FERC cannot be read, as respondent suggests (Resp. Br. 30-31), to mean that Congress intended to reach "frustration of purpose" conflicts as well as conflicts based upon mutually inconsistent obligations.

Moreover, even in the area of the law—the Supremacy Clause—where these phrases derive their meaning, this Court has never held that state law is preempted simply because it "frustrates" *an agency*'s purpose rather than that of Congress. Instead, absent field preemption, agencies are expected to act with greater precision and to express explicitly their intention to preempt. Compare *Hills-*

respondent will necessarily expand the instances in which Section 318 will be brought into play, in contravention of Congress's clear expectation that the FERC and the SEC would operate cooperatively in their respective spheres. See Pet. Br. 22, 25-35. It is inconceivable that Congress, given its plain hostility to public utility holding companies in general and to inter-affiliate transactions in particular (see *supra* 4-5), would have chosen to favor those entities with a "conflict" rule that permits them to evade FERC ratemaking review whenever they can convince a court (or even the SEC itself) that FERC regulation will somehow "frustrate" the SEC's goal of protecting the holding company's investors.[9]

In sum, respondent has premised its entire alternative ground for affirmance on a misconception of the congres-

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borough County v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), with *United States* v. *Shimer*, 367 U.S. 374 (1961).

[9] Even if a "frustration of purpose" standard applied, respondent offers no persuasive reason why the FERC order in this case frustrates the purposes of Section 13(b) or of the SEC's implementing regulations. Respondent's naked assertions that the FERC's order frustrates a "congressional determination that consumers and the public interest are best protected by application of a cost standard to affiliate transactions" (Resp. Br. 37-38) and would defeat the "balance between the interests of consumers and investors that is reflected in section 13(b)" (Resp. Br. 38) merely beg the question of congressional intent. In fact, the language, structure and legislative history of the Public Utility Act of 1935 all demonstrate a "congressional determination" that consumers would be best protected by a system of *concurrent* FERC-SEC regulation. See Pet. Br. 17-35. Contrary to respondent's suggestion (Resp. Br. 38-39), moreover, the "bleeding" of utility companies about which Congress was concerned in 1935 referred to efforts by *holding companies* to drain away a utility's earnings and capital, *not* to the reduction in revenues that almost inevitably accompanies ratemaking review of a public utility's costs for the protection of consumers. See Pet. Br. 31 n.12. FERC's order therefore cannot be said to "frustrate" Congress's purpose. Respondent's suggestion that FERC's order somehow frustrates the purposes of the SEC's implementing regulations or orders (Resp. Br. 38) is equally implausible. See *infra* 14-18.

sional scheme embodied in the Public Utility Act of 1935. Congress meant to restrict the operations of holding companies, not to restrict the dual regulatory system that was designed to protect consumers (as well as investors) from transactions in which affiliates purchased goods from each other at "costs" that exceeded market rates by almost 100 per cent. See Pet. Br. 34 (quoting Rep. Rayburn's condemnation of inflated costs in affiliate transactions as one of 17 "Reprehensible Practices of Holding Companies"). Only a conflicting requirements standard, *i.e.*, one that ousts the FERC of its jurisdiction only when its obligations are mutually inconsistent with those imposed by the SEC, fully accomplishes Congress's purpose in enacting the Public Utility Act generally and Section 318 specifically. And if there were any doubt about the matter, this Court, for reasons explained at length in petitioners' opening brief (Pet. Br. 35-39) should defer to the FERC's holding that Section 318 imposes an inconsistent obligations standard. See Pet. App. 37a-38a.

III.

As demonstrated above, Section 318 divests the FERC of its jurisdiction only if PUHCA or the SEC imposes an obligation that is inconsistent with the obligation imposed by the FPA or the FERC. As shown below, there is no conflict between any requirement imposed by the SEC and the requirements imposed by the FERC order at issue here.[10]

1. Respondent's assertion that Section 13(b) imposes an "at cost" pricing requirement on its coal contract

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[10] Petitioners agree with Ohio Power that the question whether the FERC's order is in conflict with PUHCA or with any rule or order imposed by the SEC is fairly presented in this case, has been fully briefed, and accordingly, "[t]here is no occasion for a remand" on that issue. Resp. Br. 10; see *id.* at 26-27.

(Resp. Br. 21, Amicus Br. 6) simply does not withstand scrutiny.[11] Section 13(b) does not confer upon an affiliate some absolute right to obtain its "costs" in any transaction with another affiliate. Such a standard would be an open invitation to holding companies to engage in "gold plating" and to shift costs to their affiliate supply subsidiaries. See Pet. Br. 33-34. This would be the very antithesis of what Congress intended, as it forcefully proclaimed in Sections 1(b)(2) and 1(c) of PUHCA. 15 U.S.C. §§ 79a(b)(2) and (c).

In fact, respondent bases its argument on an imagined Section 13(b), not the actual statutory provision. Absent an exemption, Section 13(b) makes unlawful *all* contract sales by a holding company subsidiary to an affiliated utility operating company unless they comply with "such terms and conditions and . . . such limitations and prohibitions as the [SEC] by rules and regulations or order shall prescribe." 15 U.S.C. § 79m(b). Congress directed the *SEC* to ensure that "such contracts are performed economically and efficiently for the benefit of such [affiliate] companies at cost, fairly and equitably allocated among such companies." *Id.* Thus, the "at cost" language is a directive to the SEC, not the regulated entity.

Moreover, Section 13(b) by its terms requires the SEC (a) to consider not only costs but also the economy and efficiency of the contracts themselves; and (b) to ensure that the relevant costs are fairly allocated among the affiliated companies. See *id.* In addition, Section 13(c) of PUHCA grants the SEC broad discretion in issuing rules, regulations and orders that prescribe protective "terms and conditions regarding the determination of costs and the allocation thereof" among affiliates. 15 U.S.C. § 79m(c).

[11] Respondent's claim that the court below "found" it "unquestioned" that the transaction was subject to a requirement under Section 13(b), Resp. Br. 27 n.21, simply mischaracterizes the decision below. What the court said was that "it is unquestioned that the coal-sale transactions between OPCO and SOCCO *are subject to SEC jurisdiction* under section 13(b)." Pet. App. 5a (emphasis added). The mere fact that respondent is subject to the SEC's jurisdiction does not give rise to any requirements.

For these reasons, Section 13(b) does not create a self-operative requirement that all of an affiliate's "costs" be passed on to the operating company that purchases its goods and services.[12] The only part of the provision that is self-operative is the injunction against the operation of the contract unless it complies with requirements imposed by the SEC. Thus, Section 13(b) imposes no "requirement" upon respondent,[13] and certainly does not compel respondent to charge rates that are based upon grossly excessive costs of goods purchased from its subsidiary.

Respondent's interpretation of Section 13(b) not only is unsupported by the plain language of the statute, but

[12] Respondent suggests (Resp. Br. 33-34) that because Section 13(b) was not listed in a letter from the SEC to this Court in *Northwestern Elec. Co.* v. *FPC*, 321 U.S. 119 (1944), Resp. Br. App. D at 98-99, as among the PUHCA provisions that are not self-operative, it must therefore be self-implementing. This argument is without merit. First, the SEC letter does not purport to include an exhaustive list of PUHCA provisions that are not self-operative. *Id.* at 99 ("The sections to which the argument might be applicable are 15(a), 20, 12(c) and 11(b)."). Second, and more significant, the operative language of Section 12(c) (making it unlawful to pay a dividend "in contravention of such rules and regulations or orders as the [SEC] deems necessary or appropriate")—which the SEC specifically identified as not self-operative—is almost identical to that in Section 13(b). 15 U.S.C. § 79*l*(c).

[13] Even if Section 13(b) somehow imposed requirements, by its terms it applies to SOCCO only, and not to respondent. Section 13(b) does not apply to companies that *purchase* goods from affiliates, but only to companies that *sell* goods. Because respondent does not sell goods to SOCCO, respondent simply is not subject to any "requirements" of Section 13(b). See Brief of *Amicus Curiae* American Public Power Association, *et al.*, at 7-11.

also is flatly contrary to the SEC's regulations implementing that provision. SEC Rule 90(a)(2), which contains the general limitation on transactions between affiliates, prohibits subsidiaries from selling goods or services "at *more* than cost." 17 C.F.R. § 250.90(a)(2) (emphasis added).[14] Moreover, Rule 92 states a special rule for the sale of goods produced by the seller: such goods may not be sold at a price that exceeds the market price. See 17 C.F.R. § 250.92.[15] This regulation was first adopted shortly after the enactment of Section 13(b) and implements the statute's mandate to the SEC to ensure economy and efficiency in the operation of authorized inter-affiliate contracts. See 1 Fed. Reg. 80 (1936). Thus, the SEC itself, in formal regulations, has rejected respondent's position that Section 13(b) *requires* an electric utility to pay no more and no less than "costs" for goods purchased from another affiliate of its holding company. The SEC's interpretation is clearly a permissible interpretation of Section 13(b) (see *Chevron U.S.A.*

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[14] Rule 90(a)(2) states: "No subsidiary company of a registered holding company . . . shall perform any service or construction for, or sell any goods to, or enter into contract to do so, at more than cost . . . ." 17 C.F.R. § 250.90(a)(2). By its terms, this regulation imposes a *ceiling* on the price which the seller may charge.

[15] Entitled "Sale of goods produced by the seller," Rule 92 provides that the sale of goods may not be made "at a price which exceeds the price at which the purchaser might reasonably be expected to obtain comparable goods elsewhere, or to furnish them itself, giving due regard to quality, quantity, regularity of supply, and other factors entering into the calculation of a fair price." 17 C.F.R. § 250.92. Contracts for the sale of goods are specifically exempted from Rule 90. See 17 C.F.R. § 250.90(d)(2) ("The price of services, construction, or goods need not be limited to cost . . . if . . . (2) such transaction consists of *a sale of goods produced by the seller*") (emphasis added).

v. *NRDC*, 467 U.S. 837, 843 (1984)) and lays to rest respondent's argument about the self-implementing nature of that provision.

2. Given Rule 92's establishment of a market-price standard for a sale of goods produced by an affiliate seller, it is equally clear that nothing in the SEC's regulations imposes a "requirement" that coal produced by SOCCO must be sold to Ohio Power at cost, regardless of the market price. SEC Rule 80(b) states that coal is a "good" to which Rule 92 applies. 17 C.F.R. § 250.80(b). And the SEC has specifically held that the comparable market test applies to inter-affiliate sales of coal produced by a holding company subsidiary. *In re East St. Louis Light & Power Co.*, 2 S.E.C. 358 (1937).[16]

In arguing that the market price limit (contained in both the FERC order and SEC Rule 92) should not be applied to the contract here, respondent notes a number of alleged benefits from its captive coal arrangement. Resp. Br. 32-33. Even if those concerns (which were not litigated before the FERC[17]) were somehow before this Court, the SEC recognized in its *East St.*

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[16] In that order, issued two years after the enactment of the Public Utility Act and a year after the SEC's adoption of the predecessor to Rule 92, the Commission recognized that a price term in a captive coal contract limiting the price to that "at which the purchaser might reasonably be expected to obtain comparable coal elsewhere, giving due regard to quality, quantity, regularity of supply, and other factors entering into the calculation of a fair price . . . *is in effect the requirement of Rule [92] which will continue to be applicable to the [coal company] as a subsidiary of the applicant.*" *In re East St. Louis Light & Power Co.*, 2 S.E.C. 358, 359 (1937) (emphasis added).

[17] Respondent's reliance upon findings of the ALJ based upon evidence that the mines were operated "efficiently" is misleading. That evidence was not contested by petitioners before the ALJ because it is irrelevant under the FERC's market-price test. See Pet. App. 43a-44a. Thus, the findings of the ALJ in no way detract from the FERC's clear holding that the coal charges respondent sought to pass on to petitioners were excessive.

Louis decision that a market price limitation is fully consistent with any benefits that may accrue from inter-affiliate contracts. Notwithstanding those benefits, the SEC found that its market price standard is compelled by "certain dangers inherent in the ownership by public utility companies of their sources of fuel." *In re East St. Louis Light & Power Co.*, 2 S.E.C. at 360. In short, respondent cannot seriously contend that the FERC's rate order conflicts with the SEC's regulations.

3. Contrary to respondent's suggestion that "there is agreement" that SEC orders impose a "requirement" that respondent pay SOCCO its "costs" (Resp. Br. 9-10), *nothing* in the orders cited by respondent requires Ohio Power to take coal at cost from SOCCO or purports to set the price for coal.[18] At bottom, respondent's entire argument is predicated on the contention that the SEC orders exempt the contract between respondent and SOCCO from Rule 92. Respondent admits: "In the absence of the SEC orders, it might be open to question whether the market test laid out in the SEC's Rule 92 for goods produced by the seller applied instead." Resp. Br. 18 n.11. But the orders in no way indicate that Rule 92 does *not* apply here.

[18] In respondent's words, the orders "approved Ohio Power's sale of coal mines and leases to Southern Ohio, approved borrowings by Southern Ohio to reduce its cost of capital, approved further investments by Ohio Power in Southern Ohio to finance efficiency improvements in mining operations, and required both Ohio Power and Southern Ohio to file quarterly financial information and statements." Resp. Br. 6. None of those orders (1) required Ohio Power to enter into the contract with SOCCO; (2) required Ohio Power to purchase any coal from SOCCO; or (3) required Ohio Power to pay any particular price. One order simply *recited* that, under the terms of the contract, Ohio Power would be paying "cost." See *Ohio Power Co.*, Holding Company Act Release No. 17383 at 2 (Dec. 2, 1971). But that order did not purport to impose a "cost" *requirement*. *Id.* The *only* source of any obligation on Ohio Power's part is the contract with SOCCO. But that contract was never approved by the SEC. See *infra* 15.

First, in contrast to Section 13(b) itself, the SEC regulations regarding the sale of coal produced by the seller are self-operative. Thus, contrary to the suggestions of respondent and its *amicus*, see Resp. Br. 18; Amicus Br. 22-24, the SEC was not required to approve the captive coal contract between Ohio Power and SOCCO; the SEC was never asked to approve that contract; and the SEC never did approve that contract.[19]

Second, as petitioners demonstrated in their opening brief, none of the orders relied on by respondent was issued under Section 13(b)—all were issued pursuant to other provisions of PUHCA. Pet. Br. 44 n.29. Moreover, SEC Rule 88(b) provides the only procedure for the SEC to make a finding that a particular holding company subsidiary complies with Section 13(b). See 17 C.F.R. § 250.88(b). None of the orders on which respondent relies was applied for or issued under this provision.

Third, the SEC has never exempted respondent's purchases of SOCCO-produced coal from Rule 92. SEC Rule 100 provides a specific procedure for the Commission to exempt "any transaction subject to the requirements of any rule promulgated under [PUHCA]." 17 C.F.R. § 250.100. But respondent never availed itself of that provision, and the SEC never invoked it. Clearly, the comparable market test of Rule 92 remains in effect with respect to this transaction.

4. Finally, even assuming that something in the SEC's regulatory scheme somehow imposes a requirement on

[19] SEC regulations make plain that a contract for the sale of goods produced by the seller need not receive specific SEC approval: "Any subsidiary of a registered holding company . . . may . . . sell goods, to an associate company thereof if . . . [s]uch transaction consists of a sale of goods produced by the seller." 17 C.F.R. § 250.87(b)(6). Consequently, such contracts need only comply with the comparable market standard of Rule 92, which governs the "sale of goods produced by the seller."

respondent with respect to the purchase price of SOCCO coal, it is clear that the requirement is, at most, a cost ceiling. As respondent itself admits, the three most recent orders state that " '[t]he price at which Ohio coal is sold to AEP system companies *will not exceed* the cost thereof to the seller.' " Resp. Br. at 5-6 (quoting *Ohio Power Co.*, Holding Company Act Release No. 20515, 14 SEC Docket 928, 929, 930 (1978) (emphasis by respondent)). As petitioners demonstrated in their opening brief (Pet. Br. 43-44), the FERC's order does not conflict with this cost ceiling.

Respondent nevertheless argues that there is a conflict in requirements in this case because the FERC's order assumes that Ohio Power could pass on to customers the market price for coal even when that price is more than actual cost, but that the SEC, by imposing cost as a ceiling, would preclude Ohio Power from obtaining in its rates the benefit of the market price. Although Ohio Power asserts that "[i]t is common ground that [this constitutes] an 'actual conflict,' " (Resp. Br. 14) its claim is mistaken and its underlying analysis reflects a total misunderstanding of Section 318 and the SEC rules under Section 13(b).

There is no conflict, even in respondent's extra-record hypothetical where market exceeds cost, because the "requirements" imposed by FERC and the SEC do not impose inconsistent obligations on Ohio Power.[20] Contrary

[20] Respondent is thus flatly wrong in claiming (Resp. Br. 15) that the FERC's rule imposing a market test whether the market price is above or below cost "could *only* be supported . . . on the 'different subject matters' rationale." In fact, that rule is fully consistent with Section 318 simply because it is always possible for a public utility to comply with that rule and with the SEC's rules regarding inter-affiliate contracts, regardless of whether Rule 90 or Rule 92 applies. See *supra* 12. There is thus no merit to respondent's argument (Resp. Br. 15) that the FERC's decision must be vacated "once it is conceded that the same subject matter was before the FERC and the SEC."

to respondent's repeated assertion (Resp. Br. 10-11, 27-28), petitioners do *not* argue for a "lower-of-cost-or-market-standard." In the hypothetical posed by respondent, Ohio Power would pay actual cost to SOCCO (consistent with respondent's interpretation of SEC requirements), but would gain the benefit of its efficiency and economy by being allowed to charge petitioners the market price pursuant to the FERC rate order.[21] Thus, the standard applied by the FERC in determining respondent's rates would be a "market" standard regardless of the relationship between the market price and SOCCO's costs, and regardless of the standard under which the SEC regulates the price respondent pays to SOCCO.[22] Petitioners have consistently recognized this built-in incentive for Ohio Power to operate efficiently, and there is nothing in the FERC's submission to this

[21] In light of Ohio Power's opportunity to recover market prices above costs under the FERC's order, respondent cannot legitimately complain that the FERC's order in *this* case may result in "trapped costs." Resp. Br. 36. But even if trapped costs actually were at issue, respondent's claim has no merit. Respondent argues this point as though there were some well-established maxim—*e.g.*, "the law abhors a trapped cost"—that supports its position. But no such maxim has ever been articulated or applied by this or any other court. To the contrary, *any* ratemaking review poses the risk that some costs actually incurred by a regulated utility will be disallowed —as imprudently incurred, for example—and hence "trapped."

[22] There is no merit to respondent's argument that this analysis "makes the SEC's regulation under section 13(b) [of PUHCA] pointless" because the intracorporate price "has no impact on consumers unless that price is reflected in electric rates." Resp. Br. 23. In fact, the SEC's regulations under Section 13(b) serve their purpose of protecting investors from manipulative intracorporate practices regardless of the FERC's ratemaking treatment of the prices a utility pays for goods and services from its affiliates. The transfer prices paid for such goods and services can dramatically affect the returns earned by investors in the affiliates and the utility, respectively; those prices, therefore, are not "meaningless bookeeping entries," as respondent claims. Resp. Br. 23.

Court that indicates that a conflict would exist in the situation posed by respondent.

In any event, there clearly is no "conflict" in requirements in the case before the Court. FERC therefore retains its vital authority under the FPA to protect consumers, such as petitioners, from excessive rates charged for electricity.

* * * *

It has been 45 years since this Court was called upon to interpret Section 318 of the FPA, and 25 years since any court of appeals was asked to construe that provision. This judicial quiescence is explained by the understanding that has existed since 1935 within all branches of the federal government that companies subject to PUHCA must comply with requirements, even though burdensome, of two different agencies—the FERC and the SEC—aimed in different ways to achieve the same overall purpose of curbing abuses by these companies. And thus, only when those two agencies appear to impose mutually inconsistent obligations is there any call for judicial interference under Section 318.

If the Court reaffirms that understanding, then neither it nor any other reviewing court likely will have reason to construe this provision for decades. On the other hand, if this Court adopts either of the interpretations offered by respondent and its *amicus*, then every FERC rate order disliked by a public utility affiliate of a registered holding company will be subject to judicial challenge under Section 318. Congress never intended this provision to serve as a shield from effective ratemaking for electric utilities that directly or indirectly serve 50 million households. Accordingly, the Court should respect Congress's intent by holding that the FERC's rate order in this case imposes no obligations inconsistent with any SEC requirement and therefore does not violate Section 318.

CONCLUSION

For the foregoing reasons, and for the reasons stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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